

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMPLOYEE PAINTERS TRUST HEALTH
& WELFARE FUND, WESTERN
WASHINGTON PAINTERS DEFINED
CONTRIBUTION PENSION TRUST,
WESTERN WASHINGTON
APPRENTICESHIP AND TRAINING
TRUST, WESTERN WASHINGTON
PAINTERS LABOR MANAGEMENT
COOPERATION TRUST FUND,
INTERNATIONAL UNION OF PAINTERS
& ALLIED TRADES PENSION FUND
AND INTERNATIONAL BROTHERHOOD
OF PAINTERS & ALLIED TRADES
UNION & INDUSTRY FUND, and
INTERNATIONAL UNION OF PAINTERS
& ALLIED TRADES DISTRICT COUNCIL
NO. 5,

Plaintiffs,

v.

TIMOTHY E. JACKSON and JODI L.
JACKSON, and the marital community
comprised thereof, and BRYDON
PAINTING SERVICE,

Defendants.

CAUSE NO.: C06-5145 KLS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

A bench trial was held in this matter on Wednesday, April 4, 2007. The plaintiffs were represented by their counsel Robert Bohrer and David Tuttle. The defendants were present and represented by their

1 counsel John Spencer and David Land.

2
3 FINDINGS OF FACT

4 This Court has jurisdiction over the parties and the subject matter of this law suit pursuant to §301(a)
5 of the Labor-Management Relations Act (the Act), 29 U.S.C. §185(a) and §§502(a)(3) and 1132(e)(2) as
6 well as under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a)(3) and
7 1132(e)(2).

8 Based on the Admitted Facts contained in the parties' pre-trial order (Dkt. #40), the Court finds as
9 follows:

10 1. The plaintiffs are joint Labor-Management Trust Funds (Trust Funds) and are governed under
11 the Act, 29 U.S.C. § 141 et seq. and ERISA 29 U.S.C. § 1001 et seq.

12 2. Brydon Painting (Defendants) and the International Union of Painters and Allied Trades (Union)
13 signed a Collective Bargaining Agreement (CBA) effective March 1, 2000 through February 28, 2005.

14 3. The Trust Funds are third-party beneficiaries to the Collective Bargaining Agreement between
15 the Defendants and the Union.

16 4. The Defendants made contributions to the Trust Funds from March 2000 through September
17 2006. Based on the evidence presented at trial, this Court also finds that the Defendants continued to
18 make contributions to the Trust Funds through the date of the trial.

19 5. The Defendants' employees have applied for and received benefits from the Trust Funds in
20 accordance with the Trust Agreement and Collective Bargaining Agreement from March 2000 through
21 September 2006. Based on the evidence presented at trial, this Court also finds that the amount of such
22 benefits paid to some of the Defendants' employees from January 2005 to the present is \$5,900.00 .

23 6. By signing the Collective Bargaining Agreement the Defendants agreed to be bound by the
24 Trust Funds Trust Agreement, which mandates that all corporate officers accept personal liability for
25 contributions to the Trust Funds. The Court finds that Timothy E. Jackson and Jodi L. Jackson are Vice-
26 President and President, respectively, of Brydon Painting Service and are therefore corporate officers of
27 Brydon Painting Services Inc.

28 7. The Defendants are doing business within the jurisdiction of this Court as that activity is defined

1 under § 301 of the Act, 29 U.S.C. § 141 et seq.

2 Based on the evidence presented at trial, the Court finds as follows:

3 8. The CBA signed by the Defendants is the controlling contract between the Defendants and the
4 Union. The Defendants have refused to sign the new CBA which was effective March 1, 2005.

5 9. The Defendants are obligated to submit Monthly Contribution Reports to the Trust Funds. The
6 reports identify, by name, each employee whose work is covered under the CBA as well as the number of
7 hours each employee worked for the month. Based on that information, calculations are made as to the
8 amount of money the employer owes to the Trust Funds for Health & Welfare, Pension Fund, L/M Fund,
9 Apprentice Fund, Industry Fund and IBPAT Pension Fund.

10 10. The applicable CBA established a ceiling regarding employer contributions to Health &
11 Welfare of \$2.05. If premiums increased for Health & Welfare during the time of the contract, the entire
12 amount due would be submitted to the Trust Funds by the Defendant. The Defendant was then authorized
13 to deduct the difference from the employee's pay check. The cap of \$2.05 could then be taken into
14 consideration by the Defendant in bids he submitted for painting jobs.

15 11. Pursuant to Article 23, ¶ 23.1 of the CBA the Collective Bargaining Agreement is
16 automatically renewed from year to year "unless the Employer or the Union gives written notice of
17 intention to modify the terms of this Agreement or to terminate this Agreement at least 60 days, but not
18 more than 90 days prior to February 28, 2005, or as the case may be, of a subsequent anniversary date."
19 Neither party has ever given the other such written notice. The CBA has therefore automatically renewed
20 itself on an annual basis since March 1, 2005.

21 12. Pursuant to the terms of the CBA, the Agreement "shall automatically renew itself from year to
22 year..." The Defendants argue that this contractual language means that their maximum contribution to the
23 Painters Health & Welfare Trust is \$2.05 as set forth in Article 19, ¶19.2.

24 The Plaintiffs respond to this argument on two basis. First, Article X, ¶ 10.3 of the CBA provides
25 as follows: "Employer adopts and agrees to be bound by the terms of the Trust Agreements establishing
26 the Funds referred to in this Article and **agrees to be bound by all past and future lawful acts of the**
27 **Trustees of each such Fund.**" (Emphasis added). The Court finds that this language clearly compels the
28 Defendants to submit contributions based on the rates established for the Trust Funds, even if such rates

1 are established after February 28, 2005.

2 According to both Steve Bloom, the Business Representative for the Painters District Council No.
3 5, and Erik Reed, Administrator of the Employee Painters Trust Funds through Zenith Administrators, the
4 present Health & Welfare rate is \$4.55 per hour.

5 13. The Plaintiffs second response is that the Defendants, by their actions, have approved and
6 ratified the new rates by their payments of the new rates and acceptance of employee benefits. This Court
7 finds that the Defendants have, by their actions approved and ratified the new rates by payments of the new
8 rates and acceptance, by their employees, of employee benefits.

9 The Defendants did not establish that they appropriately objected to the new rates. They also failed
10 to establish, so far as relevant, that they were forced under duress or coercion to make contributions to the
11 Trust Funds pursuant to the rates established after February 28, 2005.

12 Timothy Jackson testified that sometime in November 2005 he told John Ranquet, a collections
13 attorney for the Trust Funds, that he had made a substantial overpayment and said he would not pay on
14 new contract rates. This statement was made at least eight months after new rates were in effect. Other
15 than that one conversation, he provided no facts to support a claim that he objected to paying the rates
16 which were set forth on the Monthly Contribution Reports.

17 On the other hand, Jodi Jackson testified that she complained many times about the rates as far
18 back as 2002. This Court notes that the initial term of the CBA was from 2000 through February 28,
19 2005. She did not testify as to any facts regarding to whom she made those complaints or, in fact, the
20 content of her complaints. It was not until cross-examination that she testified that she complained to the
21 Auditor who was sent out by the Trust Funds to conduct an audit. This complaint was made after this suit
22 was filed and not until July 2006. She also named Melissa Kollman, who is the Accounts Control
23 Technician for Zenith Administrators. Zenith Administrators administers the Trust Funds. She did not,
24 however, provide any facts as to when she complained, how often or even the basis of such complaints
25 other than the conclusory statement that she complained "many times." The Defendants' testimony
26 compels this Court to find that the defendants failed to make timely and sufficient objections to any
27 appropriate representative of the Trust Funds regarding any new rates.

28 Jodi Jackson also testified that she felt compelled to make the payments under the new rates as she

1 was worried about her credit rating and concerned about threats of litigation to collect the amounts due as
2 calculated by the Trust Funds. These personal concerns do not raise to the level of any type of duress or
3 coercion by the Plaintiff or the Union, if in fact this would be considered a valid defense.

4 Exhibit 7 contains the Employer Monthly Contribution Report forms for Brydon Painting from
5 March 2000 through September 2006. These Reports show payment according to the applicable rates.
6 The Defendants, by their actions, ratified the various rates which were established after February 28, 2005.

7 14. The CBA requires an employer to include in their Monthly Contributions Report all employees
8 and hours worked for work done under the CBA. Article 2, ¶2.4 states as follows:

9 When an Employer desires to re-assign or employ Employees to perform
10 work outside the scope of this Article in this Agreement, the following step **shall** be
11 followed:

12 2.4.1 The payroll records **shall** contain an entry which clearly discloses
13 when the particular Employee starts work not covered under the scope of the
14 Agreement.

15 (emphasis added).

16 The Defendants assert that two employees, Paul James and Dirk S. Rickley, performed work
17 outside the scope of the CBA during the months of November and December, 2005, and therefore the
18 Defendants do not owe any money to the Trust Funds under the CBA.

19 An Audit was performed at the request of the Trust Funds by Steiner Accounting Services, Inc.
20 The Audit Report is Exhibit 8 and is dated August 8, 2006. The audit itself commenced on July 26, 2006.
21 The auditor noted that there were no entries in the payroll records to support the Defendants' position that
22 Paul James and Dirk S. Rickley were performing work not covered by the contract. This was confirmed
23 through the testimony of Carol Steiner Olsen.

24 Jodi Jackson testified that she never made any such notations due to the complexity of the payroll
25 system she utilized.

26 In order to have the benefit of ¶2.4.1 the Defendants are required to strictly comply with the terms
27 of the CBA. They did not do so with regard to Paul James and Dirk S. Rickley. They are, therefore,
28 required to make the appropriate contributions to the Trust Funds for those two employees for the two
months.

15. Carol Steiner Olsen, the auditor, sent out an audit request letter dated February 1, 2006 to the

1 Defendants. In response to that letter, Ms. Olsen received a call from Timothy Jackson in which he stated
2 that he would refuse to comply with the request for an audit. Ms. Olsen received consent to the audit on
3 on July 14, 2006.

4 Exhibit 14 is a letter dated February 25, 2006 from Tim Jackson to Steve Bloom of the
5 International Union of Painters & Allied Trades, District Council #5. In that letter Mr. Jackson agreed to
6 an audit "so that we can establish the exact amount of the over payment that you and your attorney John
7 Ranquet have been forcing me to pay by threat of legal action." Mr. Jackson's "agreement" to allow an
8 audit was limited to determining any over payment and was not an unqualified consent. The operative
9 consent to proceed with the audit was not received until after this lawsuit was filed.

10 16. Exhibit 15 is not a complete exhibit as the document references a number of attachments which
11 were not provided to the Court. They fail to prove that the benefits due, as calculated by the auditor and
12 set forth in Exhibit 8, are in an incorrect amount. The Court finds that the benefits due from the
13 Defendants is the sum of \$4,084.50 as set forth in Exhibit 8.

14 17. The Defendants' prayer in their Answer and Affirmative Defenses (Dkt. #9) included requests
15 for the return of excess employee contributions. The Defendants did not plead a specific counterclaim
16 although they assert that their Affirmative Defense set forth at Page 3 of their Answer is, in fact, a
17 counterclaim. The Plaintiffs object to the Court considering this "counterclaim" as they allege no
18 counterclaim was ever plead, no discovery was conducted in that regard, and that they first became aware
19 of a specific counterclaim when they received the Defendant's Trial Brief. (Dkt. #58, Plaintiffs'
20 Supplemental Trial Brief). During trial the Plaintiffs also cited to the Defendants' Response to Plaintiff's
21 Motion for Summary Judgment (Dkt. #17) at page 9, line 22 which reads as follows:

22 Although Defendant Brydon has not filed a counterclaim as part of this action, Plaintiffs are
23 not only entitled to recover for any deficiency, but no deficiency exists and they have
actually been overpaid by Defendant Brydon for any trust contributions.

24 This Response is dated January 19, 2007, less than three months prior to the trial date and after the
25 discovery cut-off date. This language confirms the Defendants' Affirmative Defense of payment.

26 While the Court has authority pursuant to Fed. R. Civ. Pro. 8(c) to treat a pleading as if there had
27 been a proper designation, such as a counterclaim as opposed to an affirmative defense, this is appropriate
28 only "if justice so requires." That is not the present circumstance. The Defendants' Answer clearly sets

1 forth, as an affirmative defense, the defense of payment. The Plaintiffs did not have notice the Defendants
2 were asserting a counterclaim until the Defendants' trial brief was filed on March 23, 2007, just 12 days
3 prior to trial. Yet, in the Defendants Response to the Plaintiffs' Motion for Summary Judgment the
4 Defendants confirmed that no counterclaim had been filed

5 This Court finds that the Defendants failed to allege an appropriate counterclaim and that justice
6 does not require treatment of their defense of payment as a counterclaim.

7 CONCLUSIONS OF LAW

8 18. The Defendants failed to make all the contributions to the Trust Funds as required by the
9 applicable CBA and Trust Agreement (Exhibit 3). The Plaintiffs are awarded judgment against the
10 Defendants for the unpaid benefits as found by the auditor and set forth in Exhibit 8 for a total sum of
11 \$4,084.50.

12 19. The Plaintiffs are entitled to an award of costs, attorney fees and interest as allowed by law.

13 DATED this 10th day of April, 2007.

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17 Karen L. Strombom
18 United States Magistrate Judge
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